A LETTER

TO THE

REPRESENTATIVES OF SCOTLAND IN PARLIAMENT,

RESPECTING

THE STATE OF OUR LAW, AND THE JURISDICTION AND DUTIES

OF THE

COURT OF SESSION.

BY

A SCOTTISH BARRISTER.

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A

LETTER, &c.

IN the discussions which have on several recent occasions taken place in Parliament, relative to the Administration of Justice in Scotland, not a little misapprehension seems to have prevailed as to the constitution of our Courts, and the duties performed by our Judges. A distinguished member of his Majesty's Government, who has earned the gratitude of his country, and secured to himself imperishable honour, by the improvements he has introduced, and is still introdueing, into the law of England, has announced * certain changes which he contemplates to make in our judicial establishment. It would be

* Mr PEEL's Speech in the House of Commons, 18th February 1830.

premature to animadvert upon the nature and probable effect of those changes; but that they may be the more likely to be attended with the benefit which they are meant to confer, it would seem to be justifiable that every endeavour, however humble, should be made to convey to Parliament an accurate idea of what our present system has *hitherto* accomplished, and what the character of our Judges, and the practice of our Courts, has *hitherto* been. To you, my Lords and Gentlemen, as the appointed guardians of the general interests of Scotland, but still more as the protectors of the laws and judicial establishments of the country,—secured to us, as these were by the Treaty of Union,—I venture, therefore, respectfully to address the following observations, rather with a view of setting an example to others more qualified for the task of directing your attention to a subject so worthy to engage it, than with the presumptuous expectation of being able properly to canvass it.

Those who take the trouble to look back to the debates, which, from time to time, have taken place in Parliament relative to this subject, cannot fail to be struck with the change of tone which has been adopted towards the administrators of the law of Scotland, in our Supreme Courts. In the long and animated debates, for instance, which took place in the Houses of Lords and Commons, upon the sub-

ject of the act for abolishing Heritable Jurisdictions *, not a word is to be found derogatory to the character and conduct of the Scottish Judges, although there then was more occasion to have reflected upon their conduct and qualifications, than any thing which has since occurred †. In the more recent proceedings, which commenced with the Resolutions moved by Lord GRENVILLE ‡, having directly in view the administration of Justice in Scotland, and which occupied much of the time of that, and the succeeding session of Parliament, a still more striking example of the same observation is to be found. It is not my purpose to inquire what are the causes of this change of tone; but this may be fairly dreaded, that, when such groundless and unmerited animadversions as occurred in the House of Commons during last ses-

* A. D. 1747, 14. Parl. Hist. p. 10 to 55.

† On that occasion Lord Chancellor HARDWICKE, in the speech which he afterwards caused to be printed, thus expressed himself, when adverting to the Court of Session of that day: "My Lords, I have the honour to be well acquainted with the Judges of that Court, and know them to be very able, learned, and honest men; and, therefore, I am fully satisfied that the reasons on which they have insisted, appeared to them of the greatest weight."—14. *Parl. Hist.* 11.

‡ June 18. 1806, 7. Parliamentary Debates, 730. Lord GRENVILLE said, that "he did not mean, and he trusted he should not be understood to mean, to throw the slightest reflection upon any of the learned Judges of that Court," &c.

sion *, are allowed to pass without the answer of which they are capable, a material injury is done, through the vituperation of the Judges, *to the stability and efficiency of the law of the country itself.*

This consequence, indeed, appears to be of so much importance, that, before adverting to the various duties, which, according to the constitution of the Court of Session, our Judges have to perform, I must beg leave to detain you with a few reflections upon it.

The law of Scotland has been framed and matured in such a manner, as that it is, as a system, admirably adapted to the habits and customs of the country; whilst it is well calculated as a subject, upon which the experiment has been made, and found to succeed, to afford highly useful illustrations for the improvement of the Laws of England †. Any thing,

* May 21. 1829.

† The distinguished ancestor of one of your number who had studied, with a philosophic and impartial eye the laws of both countries, has remarked, that " although our law will admit of many improvements from that of England, yet we are rich enough to repay with interest all we have occasion to borrow from it." Lord KAMES's Pref. to Hist. Law Tracts, p. 14.

And a more pointed acknowledgment has been made by, it may be presumed, a still more impartial person. " *Scotland*," said Mr BROUGHAM, in his celebrated speech upon the Law of England, " *to say nothing of the Treaty of Union, so often set set up as a bulwark against all change, might urge some very powerful reasons for*

therefore, which has a tendency to shake the confidence of the people of Scotland in it, or to bring it into disrepute in England, must be highly detrimental to us, and proportionally prejudicial to our southern neighbours.

Lest this account of our Jurisprudence, however, may be said to be dictated by partiality, rather than sanctioned by fairness and truth, let me request you to look back for a moment to the sources from which it has been derived; and then to try it by the tests of those institutional works, which have digested and arranged its maxims, and of the opinions of foreigners who have pronounced encomiums upon it.

As to the origin of the Law of Scotland. What Montesquieu * has said of the sources of the laws that were established in the republics of Italy, during the middle ages,—that the legislators of those states rejected the law of the Lombards, which determined on some particular cases, and adopted the Roman law which embraced them all, is in a great measure descriptive of the mode in which the foundations of the Law of Scotland were laid.

The poverty of the country, and the rude and scanty materials which the customs of the inhabi-

upholding her ancient system, which we in England should vainly seek to imitate."—Speech in the House of Commons, February 7. 1828, authentic edition.

* Spirit of Laws, b. xxviii. c. 6.

tants could furnish to the students of law, impelled them to resort to other countries. They repaired to Paris, Poictiers, Bruges, Amsterdam, Leyden, and other cities, to pursue the higher branches of philosophy, and to receive their education in the Civil Law. The classical education of these students, previous to their leaving their native country—their residence at the foreign schools of jurisprudence—their enlargement of mind, from the sight of different nations and governments—united to exalt the character of many of our supreme Judges, and contributed to the formation of a system of laws in some respects more refined than even the laws of the foreign states which they imitated. Nor is it difficult to perceive how this should have been the case. Unfettered by local habits or domestic prejudices, the highly cultivated minds of many of our early lawyers in classical literature, enabled them freely to converse and correspond with the jurists of various foreign countries—to compare the laws of different states—to reject one part of them, whilst they adopted another, and thus to originate a system of jurisprudence which was calculated to make, and, in some instances, notwithstanding our domestic broils, actually did make advances to refinement, even amidst the limited judicial discussion which Scotland could afford, whilst the laws in other countries remained comparatively

stationary. It was thus that the MAITLANDS, the SINCLAIRS, and the HOPES, the Judges of our Court of Session after its establishment in 1532, were educated; and it was in this manner that the materials were collected for the celebrated Institutional Works of Sir THOMAS CRAIG, and Viscount STAIR; the first written in 1603 and printed in 1655 *, the latter published in 1681. Craig's work, under the title of "a Treatise on the Feudal Law," as his editor observes, "embraced the whole body of our Scottish jurisprudence, discussing every important matter therein in a lucid and learned order, and reducing all to their original fountains of the civil and feudal law," and conferred, at the early period at which it was published, a similar boon upon the student of the law of Scotland, as, at a more modern date, BLACKSTONE's Commentaries are said to have done upon the law of England. Still more advantage was, at this early period, derived from the work of Viscount Stair. It is worth while here to introduce his Lordship's own words, contained in the dedication of his Institutions to the King, as they are both confirmatory of what I have before stated respecting the sources of our law, and contain that eminent individual's own description of that di-

* During the interval much employed in MS. as was then the custom in Scotland.

gest of our laws, which, ever since its publication, has been held as of the highest authority in Scotland. " Material justice (the common law of the world) is, in the first place, orderly deduced from self-evident principles, through all the several private rights thence arising; and, in the next place, the expedients of the most polite nations for ascertaining and expeding the rights and interests of mankind, are applied in their proper places, especially those which have been invented or followed by this nation. So that a great part of what is here offered, is common to most civil nations, and is not like to be displeasing to the judicious and sober any where, who doat not so much upon their own customs, as to think that none else are worthy of their notice. There is not much here asserted upon mere authority, or imposed for no other reason but *quia majoribus placuerunt;* but the rational motives inductive of the several laws and customs are therewith held forth: And though the application of these common rules to the variety of cases determined by our statutes, our ancient customs, and the more recent decisions of our Supreme Courts, be peculiar to us; yet even the quadrancy of these to the common dictates of reason and justice, may make them the less displeasing, and that no nation hath so few words of art, but that almost all our terms are near the common and vulgar acceptation."

The works of Craig and Stair, without making any abatement on account of the early period at which they were written, for their elegance of style, and clear and scientific views, will bear a comparison with similar works in any other nation *. There cannot be a doubt, that, in maturing the law of Scotland, these writers served to anticipate the experience of many generations. They conferred upon our law a precocity, which, in spite of many adverse circumstances, arising from the political state of the country, led to the adoption of many judicial principles, high in the scale of jurisprudence, which, with the far more extensive judicial practice of our southern neighbours, were not arrived at by them till long after, and which, in some particulars, have hardly yet been admitted into the law of England. It would be out of place to enter at present into a detailed examination of this difference; but one or two of our legal doctrines, as, for instance, those of

* The work, in the corresponding age, of COKE, is thus described by a recent English writer: "The love of abstruseness and intricacy, is nowhere more remarkably displayed than in the Institutes of Sir Edward Coke. More propositions are affirmed or denied in them, than perhaps in any other work which ever saw the light. His reasoning, like that of many ancient judges, is more hard of comprehension, from its difficulty than its closeness; and even when the reader has arrived at the conclusion, he does not always know how he has reached it."—MILLER's *Inquiry into the Present State of the Civil Law of England*, p. 496.

Compensation—of Prescription—and the system of our Records—may be mentioned as illustrations of it.

Mutual debts, which have arisen betwixt two individuals in the ordinary commerce of the world, of which the grounds or vouchers are unchallenged, naturally compensate or cancel each other, in as far as the debts are equal in amount; and, upon an action being brought by one individual against another for recovery of a debt so situated, compensation may fairly and successfully be pleaded against him. By an act of the Scottish Parliament, passed so early as the year 1592, this defence, the dictate of reason and justice, was made part of our statute law *. In England, on the contrary, it was not introduced till the year 1729, by the 13th section of the act 2d Geo. II. c. 22, and then only as an experiment, being made perpetual not sooner than 1735 by 8th Geo. II. c. 24. § 4.

It may be said, that, in the Courts of Equity in England, this doctrine of compensation was always applied. But, were I inclined to fatigue you more than I have unwillingly done by antiquarian references, it might be shown that so it was in Scotland before the year 1592. The merit, however, which I claim for our law in this respect, does not the less

* 12th Jac. VI. c. 143, 5th June 1592.

appear: for, when the rule of equity can be applied so slowly as it is in England, in such cases as legitimately admit of the defence of compensation, it becomes, in innumerable cases, of no avail. The defendant (previous to the enactment of the English statute) must have, when sued in a court of law, been found liable for the debt claimed by the plaintiffs. Years may have elapsed before he could institute a suit in Chancery to establish his counter-claim, during which he might be incarcerated, and, at the same time, by virtue of the judgment at common law, deprived of the very means of establishing his compensatory claim. The hardship of the case appeared, therefore, beyond the reach of the redress which a court of equity can afford; and, therefore, though I mean not to disparage the law of England, but only to show the advanced refinement of our own, the common law of Scotland had adopted this excellent regulation nearly 150 years before it found a place in the system of England.

The excellence of our laws of Prescription, or Limitation, as it is called in England, especially that which relates to the property of lands and other heritable rights, established by the act of the Scotch Parliament 1617, c. 12., in affording encouragement to the improvement of estates, by securing the proprietors' rights against latent deeds, in checking for-

gerics, and in suppressing improper litigation, is sufficiently established by the benefit which they have conferred upon the country, and by the commendations which have been bestowed upon them by foreign lawyers, especially in the reports which have recently been made to Parliament, relative to the improvements contemplated in the corresponding departments of the English law.

What we have most however to boast of, is the system of our Records, which, in all their departments, bear the strongest testimony to the credit of our laws, —but what is most worthy of notice, is that branch of our records devoted to the constitution and security of the feudal investiture. This was framed by various statutes of the Scottish Parliament, passed betwixt the years 1503 and 1693; but principally by the act 1617, c. 16. It would exceed the limits of this letter, to enter into a detailed history of these wise enactments, and the mode in which they carried our records to the degree of perfection which they are admitted to have attained, at so early a period as the year 1693. Amongst the benefits derived from them may be enumerated,—the promptitude which they require in the completion of the title, when property is to be either transmitted to an heir, or conveyed to a stranger,—the means they afford of restoring the principal deeds, in the event of their being destroyed

or lost,—the check they give to the fraud of a double conveyance,—and, being always accessible, the fair and open exhibition which they make of the extent and nature of the estate as a fund of credit, and the restrictions under which it labours as to succession, pecuniary prestations, servitudes, and all other conditions whatever.

Such were the benefits which the legal science of our Judges conferred upon the Law of Scotland; for it was by their rules of Court, prescribed in their Acts of Sederunt, and recommended to the approbation and sanction of Parliament, that, at the early period mentioned, 1693, the Scottish system of feudal records was completed; and to the rules of proceeding, and the legal notions then adopted by the Judges of the Court of Session, this excellent and admired establishment is *directly to be attributed.* Ought, then, the law of a country, administered under the same establishment as it then was, to *be put to the hazard of being lightly viewed,* which is found to have discovered, thoroughly methodised, and introduced, a system of records before the year 1693, the utility of which is only now brought under the consideration of a Commission appointed by his Majesty, to inquire into the Law of England respecting Real Property? The Report of the Commissioners was presented to the House

of Commons only in May last, and ordered to be printed May 20. 1829. Recollecting the difference betwixt the period, 1503, when this measure was introduced into Scotland, and the year 1829, when it is only taken into consideration as a matter for adoption in England, let me request you again to peruse the following passage from the Report which has just been mentioned *. "No measure," say the Commissioners, "has been suggested to us from so many different quarters, or has been so earnestly pressed upon us, as *a general Registry of Deeds*, whereby it is contended that every transfer of land, and every incumbrance upon it, would be placed within the means of knowledge of every person having occasion to deal with it; all rights might be suffered to prevail (as natural justice requires) according to the priority; the use of outstanding legal estates, and the expense of keeping them on foot, and transferring them, would cease, the investigation of titles would be naturally abridged and simplified, and fraud in all transactions respecting real property would be effectually prevented." "We found that information upon this important subject must be

* First Report to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property,—presented to the House of Commons, pursuant to an Address, May 19, and ordered to be printed May 20. 1829.—Page 60.

sought, not merely from the practitioners of English law, and from English treatises, BUT FROM SCOTLAND, where a general registry has been *long established*, which is the great boast of the law of that country, and from the Continental States, in many of which a similar institution has been introduced, with more or less success. We have taken steps for obtaining this information in the most authentic shape; and we shall anxiously consider whether the plan *can be safely adopted* in a country of so great extent as England, where transfers of land are more frequent than in any other part of the globe, where the law of real property must ever remain a peculiar and complicated system, and where the disclosure of private affairs may be dangerous to commercial credit."

We have here the fact admitted, that, at an advanced period of the nineteenth century, those lawyers appointed, from their knowledge of the law of England, to act as Commissioners to inquire into the great department of the law to which their report relates, are to seek for information upon the practice of registration in Scotland; when our system, under the auspices of Lord Stair and other eminent Judges of the Court of Session, was completed before the end of the seventeenth century. This admission redounds greatly to the credit of the law of Scotland, and of the Judges of our Supreme Courts, who have had the merit of in-

troducing and giving effect to the operation of a system of conveyancing and registration for nearly two centuries past, which, although tried partially in two of the English counties *, is now, for the first time, proposed to be instituted throughout the kingdom.

It is not necessary, nor is it intended, that, whilst vindicating the law of Scotland, any reflections should be thrown out against the law of England. I there-

* York and Middlesex. — The registries in these counties, though partially useful, have been found not to succeed, but they are upon a wrong system, and may be compared to what our records were previous to the act 1617. See Evidence of Mr Addison, App. First Report p. 468.

This gentleman, who has practised conveyancing for twenty years, says, " Registration upon what I conceive to be its true principles, *i. e.* a *public record*, exhibiting the transfer of property, containing in itself the evidence of its own truth, and framed in such order and method as will enable those who read the book to trace the ownership, giving them distinct information of every act affecting that ownership, without imposing upon them the task of examining acts entirely foreign thereto, *such a registration* would be a valuable addition to the law of real property. For all these purposes the present register offices are far inferior to the surrenders and admittances of copyhold estates, and I believe in a still greater degree to the forms of conveyancing used in Scotland," &c.

It is obvious, that the nature of our records, in their details, is very little known by any of the witnesses who have been heretofore examined by the Commissioners A great misapprehension exists as to the complete separation of the record of feudal titles, and of deeds of a testamentary nature. But it may be presumed, that as they are better understood they will be the more approved of.

fore, in confirmation of what is above advanced, the more readily avail myself of the opinion of a distinguished English Lawyer, who, from his acquaintance with the Law of Scotland, and jurisprudence at large, is peculiarly well qualified to give his testimony upon the subject.

After adverting to the inconvenient differences in tenures by which property is held, and the rules by which it is conveyed and transmitted in various districts in England, arising from the rules of the common law, — of gavil kind,—of borough English,— and of the customary tenures, Mr BROUGHAM * goes on to ask, " Is it fit that this multitude of laws, this variety of bodies, *the relics of a barbarous age*, should be allowed to exist in a country subject to the same general bonds of government? Is it right that such varieties of custom should be allowed to have force in particular districts, contrary to the general law of the land? Is it right, I may also ask, that in London, Bristol, and some other places, the debts due to a man should be subject to execution for what he owes himself; while in all the rest of England there is no such recourse, *although in Scotland*, as in France, this most rational and equitable law is universal."

* Speech in the House of Commons on the present state of the Law, February 7, 1828.

As to the practice of the Courts, he further observes *, " Wherever strong presumption of right appears on the part of a plaintiff, the burden of disputing his claim should be thrown on the defendant. This I would extend to such cases as bills of exchange, bonds, mortgages, and other such securities. In those cases, I think the plaintiff should be allowed to have his judgment upon due notice given, unless good cause be, in the first instance, shewn to the contrary, and security given to prosecute a suit for setting the instrument aside. *This is a mode well known in the law of Scotland,* and would put an end to all those undefended causes which are now attended with such great and useless expense, as well as injurious delay to the parties and the public. I would suggest, that, in all cases where future suits are to be apprehended, proceedings might be adopted immediately to raise the question, and quiet the title. *The law on this head also is very different in the two parts of the island.* In England, it is not possible to have the opinion of any Court, until the parties are actually engaged in a lawsuit,—opportunities for which may very frequently not occur, until the witnesses to prove a case may be dead, or an infant, or a person living abroad, and incapable of

* Speech, as before, p. 52.

will—defending his right—has come into possession. But the *Scotch law furnishes* a kind of action, the adoption of which may be productive of the greatest benefit, as I have once and again heard Lord ELDON hint in the House of Lords. I know very well that we may file a bill for perpetuating testimony, but this must be an actual vested right in the party instituting the suit; and the proceeding is, besides, so cumbrous as rarely to be used. The *Scotch law, on the contrary, permits a declaratory action to be instituted by the party in possession or expectancy, quia timet, and enables him to make all, whose claims he dreads, parties, so as to obtain a decision of the question immediately.* This is, of course, and very probably, at the expense of him who brings forward the suit for his own interest, unless when a very obvious benefit arises to the other party; for *in Scotland they have nothing like our statute of Gloucester, and costs are always in the discretion of the Court, as with us in equity.*"

As to the alleged delay in lawsuits, and unnecessary litigation, in Scotland, compared with England, the following observation by Mr BROUGHAM * is still farther well worthy of notice. Speaking of the great delay and expense caused in the English

* Speech, as before, p. 60.

Courts, by allowing parties to imparl, as it is called, he remarks: " The interest of a Court of Justice being to make both parties come out with the whole of their case as early as possible, the law should never lend itself to their concealments. This remark extends to the proof, as well as the statement of the case; an intimation of what the evidence is, may often stop a cause at once. *In Scotland the law in this respect is better than ours*, for no man can produce a written instrument on the trial, without having previously shewn it to his adversary. For want of this salutary rule, I have often seen the most useless litigation protracted for the sole benefit of practitioners. I was myself lately engaged in a cause, the circumstances of which will give the House an idea of the mischief. I was instructed not to shew a certain receipt to the opposite party, as my client, the defendant, meant to nonsuit his adversary in great style, as he would call it. Well, the plaintiff (an executor) stated his case, and called his witnesses to prove the debt. I did not take the trouble to cross-examine, which would have been quite unnecessary. Equally so was it to address the Jury. I acknowledged the truth of all that had been sworn to on the other side, but added, that it was all useless, as I happened to have a receipt for the money, which had been paid to the testator. This, of course,

put an end to the case. The sum sought to be recovered did not exeeed twenty pounds, and the expenses could not have been less than a hundred. "*If that action had been brought in Scotland, it never could have come to trial, nor indeed been prosecuted beyond the mere demand; for this receipt being shewn, the claim would have been abandoned. I think, Sir, the adoption of some* such rule as the Scotch might be desirable. At least it would be well to enquire how it acts in Scotland, and be guided by the result."

The length of these quotations will be excused, as they are as apposite to the subject as any thing that could be said, and as they authenticate in the language of so well qualified a person as their author, the praise which he has bestowed upon many parts of our system of laws. But what he has said is nothing more than what had been said by Lord BACON, who tells us that he had "read and read with delight the Scottish statutes, and some other collections of their laws,—with delight I say, partly to see the brevity and propriety of speech, and partly to see them come so near our laws."

Very few modern English lawyers, it may be presumed, have had the inclination, and still less the time, to "read with delight" the law of Scotland. Their only means of information arise from the hurried

and desultory glances which they have been compelled to take at it, under the task of perusing some ill-stated, ill-arranged, irksome Appeal Case. But when viewed through this most unfavourable medium, by the eye even of an English lawyer, it exhibits features and characteristics worthy of eulogy and imitation, is it to be ascribed only to national prejudice, that our ancestors should have made a provision for its integrity in the Articles of Union; and would not their posterity in the present day be chargeable with flagrant degeneracy and dereliction of duty, were they not anxiously to guard against the slightest risk of its being brought into disrepute by any groundless insinuation, thrown out either against the law itself or against those by whom it is administered? Influenced by this feeling, I have had two objects in view, in dwelling, it may be thought, with prolixity upon the topics which have been noticed;—in the first place to endeavour to shew that there are materials for proving that, although the workmen have sometimes been blamed, the work itself has been well executed; but chiefly, in the second place, to establish, that, as the work has been well executed, and as a fabric has been reared up, which has called forth the admiration even of strangers, *that* circumstance alone affords a much stronger argument in fa-

vour of the skill and qualifications of the administrators of the Scotch law, and of the system according to which it has been formed, and is administered, than any thing that has or can be said to the contrary. Improper and unfit persons have been occasionally advanced to our judicatories; that, however, is incident to the imperfections of all human establishments. As improper appointments have been, and still may be, made in other countries, as in Scotland; but these are not less exceptions to the general rule in the one situation than in the other. It has been seen, that various parts of our laws have been eulogised by English lawyers, when compared with the corresponding parts of their own jurisprudence; that our constitutional writers have equalled, if not excelled, their contemporaries in other countries; that our statutes have been extolled for their brevity and perspicuity; and that our system of municipal law has been praised for its adaptation to the change of habits, and the progress of civilization in the country, little, or rather not at all, trammelled by those ancient notions and customs, the "relics of a barbarous age," as they have been called, which have retarded the advancement of the law of England. And what is all this to be mainly ascribed to, but the legal attainments and the enlightened views of our Judges, guided and rendered practically beneficial as these

have been by the constitution of the judicial functions under which they have acted?

Granting, however, that the system of the Law of Scotland is praiseworthy, and that the constitution of our Court of Session is good, still it has been insinuated that our Judges are deficient in industry and diligence in the discharge of their duty.

In order to ascertain the truth or the groundlessness of this charge, it is not necessary to enter into a detailed history, and defence of the constitution of our Courts;—nor to solve the problems—whether pleadings, partly oral, and partly written, as they are in Scotland, are preferable or not to pleadings that are entirely oral*; and whether it is advantageous or not that a Court of Justice should, like the Court of Session, possess a cumulative jurisdiction of both law and equity;—though all these preliminary points, it is humbly thought, might be shewn to be quite favourable to the system of Scotland; for the proper question is, Whether our Judges, according to the existing constitution of our Supreme Courts, regulated and sanctioned as that has lately been by Parliamen-

* See ST PIERRE, Memoire pour dim. le procès, 232–237. After giving various reasons for the superiority of written over oral pleadings, he concludes:—"Mais, me dira-t-on, quelles sortes de causes doivent être jugées en audience; Je crois, que nulle affaire sera si bien jugée en audience, qu' au rapport."

tary inquiry and legislative enactments, are justly chargeable with remissness or inactivity in the discharge of their duty ?

The habit of contrasting the Fifteen Judges of the Court of Session with the Twelve Judges of England, as they are improperly called, forgetting the other English Judges in the Courts of Equity, and without taking into consideration the totally different nature of their respective jurisdictions, and the mode of pleading, has undoubtedly led to much misconception upon the subject. In order that the criterion of the number of Judges should be a fair one, it ought to be recollected that, besides the twelve Judges of the Common-Law Courts, there are, in the Court of Chancery alone, first, the Lord Chancellor; secondly, the Vice-Chancellor; thirdly, the Master of the Rolls; fourthly, twelve Masters in Chancery; and, fifthly, no less than seventy-four Commissioners of Bankruptcy. It ought to be recollected, also, that, besides the eighty-nine English Judges enumerated, there are the Judges of the High Court of Admiralty—of the Courts of Civil and Canon Law at Doctors' Commons—the courts of the three counties of Chester, Lancaster, and Durham—and the Stannary Courts of Devonshire and Cornwall.

Nor does the great mass of legal business transacted in the courts last mentioned, from which the

Judges in the Courts of Common Law and Equity are thus relieved, come afterwards under the cognizance of these judges; for the right of appealing lies not to them, but to the Court of Delegates *. The Stannary Courts of Devonshire and Cornwall, appointed for the administration of justice among the tinners, are held before the Lord Warden and his substitutes, in virtue of a privilege granted to the workers in the tin-mines there, to sue and be sued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their lawsuits in other courts. No writ of error lies from hence to any court in Westminster Hall, but the right of appeal lies from the Steward of the Court to the Under-Warden, from him to the Lord Warden, thence to the Privy Council of the Prince of Wales, as Duke of Cornwall, and, in the last resort, to the King †.

There are, besides all these, occasionally Sergeants-at-law, King's Counsel, or Barristers, appointed to act as substitutes for the Common-law Judges.

Now, let it be recollected, that all the subjects of litigation competent to the various English courts which have been mentioned, are, either through the medium of original or of appellate jurisdiction, com-

* 3 BLACKSTONE's Com. 66. and 69. † Ibid.

petent to the Court of Session, which is, therefore, called upon to discharge the functions of both a Court of Law and a Court of Equity; and, by a comparison of the number of the Judges with the numbers of the population in the respective countries, a slight calculation leads to the result, that a quantum of judicial labour, not materially different, devolves upon the Judges in the two countries respectively.

Nor will it be said that the inhabitants of Scotland are less litigious than those of England. The lower classes are poorer, but they claim the superiority of being better educated than their southern neighbours, and, like the propensity of the collegian to wrangle in the university as his lore extends, one of the consequences of the education of the Scottish peasantry, probably is to give them that turn for litigation to which they are said to be addicted.

To what conclusion, then, does this calculation lead? If the Judges in England are diligent—as they certainly must be allowed to be—is it not to be presumed, that, with a population equally great as in England, in proportion to the machinery by which justice is administered, the Scottish Judges discharge the duties incumbent upon them with diligence and activity—at all events, that due credit has not been given to them for their labour, and industry?

It will be necessary, however, to corroborate this inference, by a short examination into the actual nature and extent of the work which our Judges do perform. It has been said, that their different sessions or terms put together, do not amount to more than one-half of the year—and that they remain in Court only a few hours each day, each of the five days in the week when they do meet. Persons unacquainted with the forms of judicial proceeding in Scotland, may very naturally, from this statement, be inclined to think that too little time is devoted by the Judges to the duties of their office. But it is neither by the length of the sessions, nor by the number of the hours which are spent in Court, that the Judge's labour is to be measured. You are aware that, in the two Inner Houses of the Court, such part of the pleadings as cannot be properly disposed of orally, are printed on pages of the quarto size; and that the corresponding share of the pleadings, before the Lords Ordinary, in the Outer House, are submitted to the Judge's consideration, partly in manuscript and partly in print. The whole of these printed and manuscript pleadings are perused, and the time requisite for consulting books, or reported decisions, touching the subjects argued, and forming their opinions upon them, is spent, by the Judges, *out of Court*—in their own houses, or *at Chambers*,

as it is called in England. Except in those cases which are argued *viva voce* at the Bar, the time spent in Court can afford, therefore, no accurate gauge of the Judge's diligence out of Court; although, making allowance for the nature of the cause requiring a longer or shorter exposition of its facts, and of the legal principles upon which it turns, the probability is, that the time spent in delivering opinions in Court, will generally be in the inverse ratio of the time occupied in maturing them out of it, as brevity and condensation of speaking is generally the result of full and deliberate previous consideration.

In the year 1789, it was calculated, that the "total prints to be read, advised and considered by the Lords of Session, in the space of one year," (about that period), would "amount to 24,930 quarto pages*." The division of the Court into Two Chambers, and the recent enactment for shortening the pleadings, might be supposed to have diminished this extent of reading, as devolving upon each of the Divisions respectively. But the truth is, that, although these changes have undoubtedly checked the amount of the printed pleadings, which the increasing popula-

* Lord SWINTON's Considerations for Dividing the Court of Session, &c. p. 23.

tion, wealth and commerce of the country would have produced, still it will be found that, notwithstanding these changes, the causes of augmented litigation just mentioned have left an extent of printed pleadings to be perused out of Court, by the Judges of each Division, not much inferior to what the undivided stream of business was in the year 1789.

Without vouching for the absolute correctness of the following facts, yet from the inquiries which the author has made in the several offices, he ventures to state that they may be relied on as very nearly approximating to it. A collection is made, and kept for after reference, of the printed pleadings submitted to both Divisions of the Court. From this collection, in reference to the year 1828–9, it appears that the First Division of the Court of Session, had, for consideration in the causes that came before it that year, printed papers to the amount of nearly *seventeen thousand three hundred and sixty-five* quarto pages, exclusive of other printed papers, for sequestrations, personal protections, confirmations, discharges of trustees, and various other incidental matters, framed indeed according to established style and form, but requiring all of them to be examined, in order to see that they are correct, particularly by the presiding Judge. This last class amounted,

within the above year, to *one thousand six hundred and seventeen* quarto pages.

Under the same circumstances, it appears that the Judges of the Second Division had to consider, of the first class, about *nineteen thousand two hundred and sixty-six*, and of the second class, *one thousand one hundred and fourteen* quarto pages.

Taking the number of printed pleadings as above, falling under the cognizance of the Second Division, it will be seen that, deducting the Sundays, there would fall to be read by the Judges, each day of the session, about 124 pages, which those acquainted with the nature of judicial business will admit to be impracticable. Accordingly, it is the usage, and seems always to have been the intention, of those who framed the regulations for the sittings of the Court of Session, that a great part of this business should be done in what is, therefore, rather improperly called *vacation*-time. According to the established forms, a great part of the printed papers are prepared and distributed ("boxed," as it is technically called), amongst the Judges, at the commencement of, and during, the vacations. These papers are taken with them to the country, if they have occasion to leave town, to peruse, and prepare notes on them for reconsideration and after-decision; and it may be easily believed, that the Judges (especially those of them who belong

to the Court of Justiciary, and have to go the Circuits), deducting the time allotted by each of them, during vacation, to their duties in the Bill-Chamber cannot read, during vacation, the whole of the session papers which must be studied, in preparation for the next session, without devoting a great part of every lawful day, during the vacation, to this labour.

With respect to Lords Ordinary, the duties accruing to each of them varies, it being optional to suitors to select their Judge. But, generally speaking, it may be assumed, that the function of a Lord Ordinary requires at least as much labour as that of any of the Inner-House Judges. He generally sits longer each day in Court than an Inner-House Judge, having a greater share of oral pleading before him; but this gives him little relief from Chamber-duty, as his reading is more irksome and tedious, inasmuch as many of the papers he has to read are in manuscript. The causes that come annually before the Judges of the Outer-House, and are prepared and decided by them, are ascertained from the enrolment-book. These, independently of matters remitted to them by the Judges of the two Divisions, for preparation, as in election cases, &c. which originate in the Inner-Houses, amounted as follows:— In the year 1826, to 2026; in 1827, to 1912; in

1828, to 1925; in 1829, to 2040. In all, for these four years, to 7973.

The duties of the Bill-Chamber have been mentioned as one of the sources of occupation of the time of the Judges during the vacations of the Court, the nature of which it may be requisite briefly to explain, for the information of those who have not professionally had opportunities of being conversant with the subject.

The Bill-Chamber is a department of the Court of Session, into which cases, requiring an immediate interposition of its authority, are brought, by summary application, termed BILLS. The object of these is to obtain an order to stay the proceedings of Inferior Judges; to sist executions on decrees, interdicts, or injunctions erroneously granted by Inferior Judges; and also to prevent extrajudicial acts injurious to the fortune, reputation, or personal liberty of the applicants. The urgent nature of the business which comes into this department requires, as is the case, that there should be no intermission of access to the obtaining of redress in such matters; and, accordingly, thirteen of the Judges of the Court of Session (the Presidents of the two Divisions being the exceptions), discharge the duties of the Bill-Chamber weekly, by rotation, in vacation, while the

junior Lord Ordinary officiates in the time of session.

From the books kept by the clerks in that office, it appears, that, for the period from 12th November 1825 to 11th November 1829, the number of bills amounted to *four thousand eight hundred and forty-one*, some of which were disposed of without requiring answers; others, from the nature of the subject, requiring answers. Both these bills and answers are studied in manuscript. From the papers lodged during the above period, it appears that the average number of pages is seventeen of folio writing, and that the number of pages which have been studied and advised in *each* of these four years, has amounted to *thirty-five thousand nine hundred and seventy-two* folio pages. It is to be observed, too, that the above account of the ordinary business of the Bill-Chamber does not include that which arises relative to sequestrations in cases of bankruptcy, which is also discharged by the Lords Ordinary officiating on the Bills.

The periods of the sitting of the Court of Session have been various, at various times; but came, at length, to be divided into two sessions, called the Summer and Winter Sessions; and, by an act of the Scotch Parliament*, there was a power granted to the

* 21st April 1661.

Court to adjourn for a few days about Christmas, then called the "Yule vacance." The period of the winter session is now from 12th November to 11th March inclusive: The summer session commences 12th May and ends 11th July; both fixed by statute*. With regard to the "Yule vacance," or Christmas vacation, as it is now called, it was fixed by the 3d Geo. II. cap. 32, that this vacation should take place on a day to be named by the Court, between the 15th of December and the 15th January yearly, and should not exceed ten days. But the time was extended to twenty days by 2d Geo. III. c. 27, which proceeds upon the following preamble:—"Whereas it has been found by experience, that an adjournment of ten days, in so long a session, is not, at all times, sufficient for answering the purpose thereby intended; and that the course of business before the said Court may often require an adjournment for some time longer, not only for enabling the Judges to advise such causes as they cannot overtake during their sittings, but also for enabling the counsel more fully and accurately to prepare their causes for the decision of the Court, whereby *great delays and expense*, in carrying on business before the said Court, *would be prevented*."

The terms of this statute shew, that neither the Christmas vacation, nor the longer vacations in Spring

* 1790.

and Autumn, were *then* understood *by Parliament* to be devoted to relaxation from business. On the contrary, the barristers are at these intervals employed in writing the papers, which are, either in manuscript or print, to be laid before the Judges; and it is not necessary, nor is it allowed, that parties shall wait till the Court meets in the subsequent sessions to lay these papers before the Judges. There are regularly fixed by their Lordships, before the termination of each session, two days (called, technically, "*box-days*"); the first of which, in the long vacations, is generally about three weeks or a month after the rising of the Court, and the second about three weeks thereafter: And on or before the first day so appointed, the practitioners who have papers to present against any judgment of a Lord Ordinary, or otherwise, are required to have such paper ready, and then to lodge it with the proper officer in court; and such papers as are to be presented in answer to the preceding, or for the preparation of which (if not answers), a longer time has been allowed, must be lodged on or before the second day fixed; failing which, neither can be received. The purpose of this practice is to promote promptitude in preparation of papers, but chiefly that the papers, after being lodged as above described, may be immediately distributed, as they always are, to the respective Judges, to be by them perused during the remainder

of the vacation, before the Court meets in the succeeding session. This being the mode of proceeding, it not unfrequently happens that an equal pressure of business devolves upon both Counsel in writing, and Judges in reading, during vacation (improperly as it is so called), than during the public sitting of the Court.

The Court of Session has, from a very ancient period, never sat on Monday; for which, Lord Stair * gives the following reason:—"They sit every week-day, except Monday, that day being free, because causes heard upon Saturday could have no time for drawing informations, if the dispute were to be decided on Monday, in the forenoon." But, besides this reason, there is one of a more urgent nature, which the increased frequency of crime has rendered still more indispensable. The statute 1672, cap. 16, provides, that the Court of Justiciary, to which the Lord Justice-Clerk, and five of the other Judges belong, shall meet on Mondays in session time. From the increase of crime it has, for some time past, become indispensably necessary that these Judges should be occupied in the criminal department of their duty, not only every Monday during the sitting of the Court of Session, but generally for a week immediately after the Court of Session rises, or, as it would be called

* B. iv. 2, 4.

in England, after term; and, from the number of trials which it is necessary to overtake, owing to the unavoidable augmentation of criminal prosecutions, these sittings of the Lords of Justiciary frequently last from ten o'clock in the morning till a late hour at night, sometimes extending, as on several recent occasions, to an advanced hour of the ensuing morning.

These statements will, it is humbly thought, be deemed a satisfactory answer to those who have candidly, though ignorantly, asked, Why does the Court of Session not meet on Mondays during its sittings? And why are its terms of sitting not longer? As the length of time spent in Court by the Judges affords, for the reasons mentioned, no criterion of the extent of their judicial labour; so neither does the length of the vacations furnish any measurement of their relief and relaxation from official labour. As well might one attempt to estimate the labours of the Twelve Judges of England, by taking into account only the time which they spend in Westminster Hall, during the four terms. They have a great deal to do before and after term; and the Scotch Judges have also a great deal to do before and after the session. The form is different, but still the duty must be done.

Recollecting, therefore, the combination of jurisdic-

tion in law and equity,—the ministerial as well as judicial duties which, in consequence of this combination, devolve upon the Scotch Judges, whilst they have not the aid of the numerous auxiliaries, formerly mentioned (Masters in Chancery, and Commissioners of Bankruptcy, and temporary judges), available to their English brethren, it may be doubted whether some of the former, at least, are not, throughout the year, subjected to as great an extent of judicial labour as some of the latter : at all events, it must be manifest that the amount of the diligence of the whole of the former, when compared with that of the whole of the latter, and measured merely by what is done upon the Bench, has been most egregiously underrated.

Nor, because the Scotch Judges do not attempt or profess to *do as much* as the English, does it by any means follow that they can be chargeable with doing *too little*. It has been proposed in Parliament, by the right honourable gentleman who has done himself so much honour in improving the English law, that the number of the English Judges should be increased; and an English lawyer, who has deeply studied the subject, gives us the following account of the English system *. After describing various changes that have, during the last ten years, been made in the functions of the

* MILLER's Enquiry into the Present State of the Civil Law of England, p. 459–460.

English Judges, he remarks,—" To all these changes there are several extremely strong objections. The ancient constitution of our Courts of Justice has been nearly as much impaired as if they had undergone a total transformation; there have already been five or six changes, instead of one. *The business of the country is not done;* and yet the Judges continue *vastly over-laboured.* By no arrangement of business, or distribution of the Judges, can they be enabled to overtake their duty. The great mistake which has all along been committed, is, that more is expected of them than human strength and understanding can perform."—" In addition to this, as they are all upon duty at the same time, if it should happen that any of them becomes indisposed, a contract is made with some of the Sergeants at Law, King's Counsel, or Barristers, to perform the duties of a Judge for a certain length of time, to the obvious discredit of the whole system of English judicature. It is poor economy, and worse policy. It never succeeds to see a man one week on the Bench, and another at the Bar."

In this passage are pointed out the evils which have arisen from too great a subdivision of the judicial offices in England, and still more from occasionally borrowing the aid of a temporary judge from the bar. The Court of Session does perform the business

of the country, without having recourse to the subsidiary help, and consequent expense to the community of temporary Judges, and without being chargeable with the non-performance of duty, to the extent at least which is stated against the English Judges by the author just mentioned. There are arrears, and there may be delays, in the Court of Session; but these will be diminished, to a certain extent, when practitioners become more habituated with the recently improved forms of proceeding. These delays, and arrears, are, at any rate, not to be ascribed to the inability or the indolence of the Judges. He, indeed, must have a very chimerical idea of a Court of Justice, and of human nature, who can imagine that there ought to be no delay, and no arrear of business. In the most perfect tribunal that is compatible with the habits of real life, especially if it is established in a rich populous, and civilized country, there always must, to a certain extent, be arrears of business and delay, which arise, if not wholly, at least in many instances, chiefly from the conduct, the concealments, and the shuffling of the suitors. The Court of Session must, in common with all similar establishments, labour under this disadvantage. But when the individual merits of the Judges are the subject of consideration, either within the walls of Parliament, or elsewhere, that disadvantage ought to be ascribed to its

true cause, and no undue abatement allowed to be made from that respect, which every man who has the interest of his country properly at heart, ought to feel for their office, as well as for their personal characters, and professional acquirements.

In concluding the observations which I have thus ventured to submit to your consideration, it has not been my intention to make any objection to such changes in our judicial establishments as, in the wisdom of Parliament, may be deemed requisite. But in looking forward to the changes that have been announced, or to any alterations that may afterwards become the subject of discussion, it is to be anxiously hoped that the merits of our law itself will be duly appreciated; and, still more, that justice will be done to the skill, the diligence, and the fidelity of those functionaries under whose guidance our law has been matured, and is still administered with benefit to the country, and has attained a character which has attracted the admiration of the legal reformers in England. These establishments have witnessed and outlived many revolutions in this country, and it is to be expected that they are destined to survive many future emergencies. In legislating for their improvement, the interests of the future ought not, therefore, to be sacrificed to the exigencies of the present. Whilst no obstacle is, on the one hand,

thrown in the way of such alterations as the advancement of the country have rendered expedient, great care ought to be taken, on the other, that the temporary feelings excited by the present embarrassments of the country, by the effects of an expensive war, or by mistaken views of economy, may not give rise to the introduction of such changes as may render our courts inadequate to the duties incumbent upon them even at present; and, still more, to that augmentation of employment which an increasing population, and a return of our prosperity in agriculture and commerce, may soon be expected to produce.

EDINBURGH, *Feb.* 23. 1830.